

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of February, two thousand twelve.

PRESENT: RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges
MIRIAM G. CEDARBAUM,*
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v.

10-2645-cr

RORY JOSEPH,

Defendant-Appellant.

* Judge Miriam G. Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

1 FOR APPELLANT: NICHOLAS J. PINTO, New York, NY

2
3 FOR APPELLEE: CHRISTOPHER M. MATTEI, Assistant United
4 States Attorney (Robert M. Spector,
5 Assistant United States Attorney, *on the*
6 *brief*), for David B. Fein, United States
7 Attorney for the District of Connecticut,
8 New Haven, CT
9

10 Appeal from the United States District Court for the
11 District of Connecticut (Hall, J.).
12

13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
14 **AND DECREED** that the judgment of United States District
15 Court for the District of Connecticut is **AFFIRMED**.

16 Appellant appeals from a judgment of the United States
17 District Court for the District of Connecticut (Hall, J.),
18 which imposed the statutory maximum sentence of 120 months'
19 imprisonment, followed by three years of supervised release.
20 Pursuant to a plea agreement, Defendant-Appellant Rory
21 Joseph pleaded guilty to a one-count indictment charging him
22 with unlawful possession of a firearm by an individual who
23 is subject to a restraining order in violation of 18 U.S.C.
24 §§ 922(g)(8) and 924(a)(2). On June 24, 2010, the district
25 court sentenced Joseph to the statutory maximum of 120
26 months' imprisonment, followed by three years of supervised
27 release. Joseph requests that the Court vacate the sentence
28 and argues that the Government breached the plea agreement.

1 Joseph also claims that the district court committed
2 procedural and substantive error when determining his
3 sentence. We assume the parties' familiarity with the
4 underlying facts, the procedural history, and the issues
5 presented for review.

6 To determine whether a plea agreement has been
7 breached, we "look[] to the reasonable understanding of the
8 parties as to the terms of the agreement." *United States v.*
9 *Riera*, 298 F.3d 128, 133 (2d Cir. 2002) (internal quotation
10 marks and citations omitted). Although we typically review
11 the district court's interpretation of a plea agreement *de*
12 *novo*, *id.*, where, as here, the defendant fails to object
13 below to the government's alleged breach of a plea
14 agreement, the defendant has forfeited the claim unless he
15 can show plain error under Federal Rule of Criminal
16 Procedure 52(b). *Puckett v. United States*, 556 U.S. 129,
17 134 (2009). Joseph is not entitled to relief because not
18 only is there no plain error, there is no error at all.

19 Joseph's principal argument on appeal is that the
20 Government breached the plea agreement by using information
21 known to the Government at the time the plea agreement was
22 executed to advocate later, during sentencing, for a two-

1 level enhancement for obstruction of justice and against a
2 reduction for acceptance of responsibility. Relying heavily
3 on *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003),
4 Joseph argues that because the Government learned (and did
5 not disclose to Joseph) that he was soliciting Cornelius
6 Taylor to murder his former girlfriend in October 2009—two
7 months before the plea agreement was executed—the Government
8 could not rely on this conduct at sentencing.

9 We conclude that the Government did not breach the plea
10 agreement by relying on this conduct. Joseph's campaign to
11 orchestrate his former girlfriend's murder was still under
12 investigation when the plea agreement was signed and,
13 therefore, provides a "good faith post-agreement basis" to
14 advocate for sentencing enhancements and against a reduction
15 for acceptance of responsibility. *United States v. Roe*, 445
16 F.3d 202, 210 (2d Cir. 2006). Indeed, the conduct at issue
17 continued for two months *after* the execution of the
18 agreement. Moreover, *Palladino* is distinguishable. There,
19 we held that the government breached the plea agreement by
20 seeking an enhancement based on information known to the
21 government before the plea agreement. *Palladino*, 347 F.3d
22 at 34. Here, by contrast, the information was still under

1 investigation when the plea agreement was executed.

2 We also reject Joseph's contentions that the Government
3 breached the plea agreement by advocating for additional
4 enhancements other than those specifically outlined in the
5 plea agreement and by advocating for a non-Guideline
6 sentence. The Government's actions were entirely consistent
7 with the plain language of the plea agreement, which states:
8 "The parties reserve their respective rights to argue for or
9 oppose additional adjustments to, and departures from, the
10 applicable guideline range as determined by the Court.
11 Additionally, both parties reserve their right to argue for
12 and/or oppose a non-guideline sentence."

13 We turn next to Joseph's claim that the district court
14 committed procedural and substantive error when determining
15 his sentence. We review the sentence imposed by the
16 district court to determine whether it is reasonable.
17 *United States v. Cavera*, 550 F.3d 180, 187-88 (2d Cir. 2008)
18 (*en banc*); *Gall v. United States*, 552 U.S. 38, 46 (2007).
19 Reasonableness review, which has both procedural and
20 substantive components, is "akin to review for abuse of
21 discretion." *United States v. Fernandez*, 443 F.3d 19, 27
22 (2d Cir. 2006).

1 First, we reject Joseph's claim that the district court
2 committed procedural error by imposing a two-level
3 enhancement for obstruction of justice under U.S.S.G. §
4 3C1.1. Generally, in order to apply this enhancement, the
5 district court must find that the defendant acted with
6 "specific intent to obstruct justice." *United States v.*
7 *Woodard*, 239 F.3d 159, 162 (2d Cir. 2001) (internal
8 quotation marks omitted). Here, the district court found
9 that the enhancement was proper because following his
10 arrest, from August 2009 to February 2010, Joseph attempted
11 to solicit Taylor to murder his former girlfriend. In
12 making this finding, the district court found the testimony
13 of Taylor to be particularly credible. We cannot say that
14 this was clearly erroneous. Taylor's testimony was also
15 corroborated by the testimony of Special Agent Wheeler.

16 Moreover, we reject Joseph's argument that the district
17 court erred by finding that Joseph attempted to arrange his
18 former girlfriend's murder with the specific intent of
19 making her unavailable for sentencing. Taylor testified
20 that Joseph's motivation for murdering his former girlfriend
21 was that "[h]e didn't want her to be around where she can
22 testify against him." Indeed, even if, as Defendant argues,

1 he was unaware of his former girlfriend's role in the
2 prosecution in August 2009 when he started soliciting Taylor
3 to murder her, there is no doubt that he would have been
4 aware of her potential role by February 2010 after receiving
5 the Government's discovery materials.

6 Second, the district court did not commit procedural
7 error by refusing to grant Joseph a reduction to his offense
8 level for acceptance of responsibility under U.S.S.G. §
9 3E1.1(a). The reduction is unavailable, except in
10 "'extraordinary cases,'" to a defendant properly found to
11 merit an obstruction-of-justice enhancement. *United States*
12 *v. Champion*, 234 F.3d 106, 110 (2d Cir. 2000) (per curiam)
13 (quoting U.S.S.G. § 3E1.1, cmt. n.4).

14 Joseph argues that the district court erred in not
15 granting the reduction because he did not frivolously
16 contest relevant conduct. This misses the point. The
17 district court focused on Joseph's post-arrest conduct, not
18 Joseph's denials of Taylor's testimony. The district court
19 stated: "I don't see how a person who commits a crime . . .
20 [and] who then while incarcerated . . . does the same thing
21 over again can be said to have accepted responsibility for
22 the offense." Considering that Joseph solicited Taylor to

1 murder his former girlfriend for over five months, there was
2 more than adequate evidence in the record to make this
3 finding.

4 Third, we find no procedural error in the district
5 court's upward departure based on extreme psychological
6 injury to the victim, Joseph's former girlfriend. The
7 Guidelines permit an upward departure when psychological
8 injury to the defendant's victim is "much more serious than
9 that normally resulting from commission of the offense."

10 U.S.S.G. § 5K2.3. In addition, there must be "a substantial
11 impairment of the intellectual, psychological, emotional, or
12 behavioral functioning of a victim, when the impairment is
13 likely to be of an extended or continuous duration, and when
14 the impairment manifests itself by physical or psychological
15 symptoms or by changes in behavior patterns." *United States*
16 *v. Lasaga*, 328 F.3d 61, 65-66 (2d Cir. 2003) (quoting
17 U.S.S.G. § 5K2.3).

18 Here, the district court engaged in a thorough analysis
19 of this Court's case law in concluding that a departure was
20 appropriate. The district court noted: "It strikes me that
21 the victim in this case clearly demonstrates extreme
22 isolation, personality change, unusual suspicion . . . [a]nd

1 prolonged fear, prolonged because of a very active defendant
2 that continued long after the commission of the offense of
3 conviction." The district court also highlighted the
4 victim's sense of guilt about the endangerment of her
5 family, which the district court observed was not "a
6 psychological harm that would normally be experienced in the
7 commission of this crime." Accordingly, we find no error in
8 the district court's departure.

9 Finally, we need not consider Joseph's claim that the
10 district court's sentence was substantively unreasonable.
11 Joseph did not raise this issue until his reply brief and,
12 therefore, it has been waived. See *Conn. Bar Ass'n v.*
13 *United States*, 620 F.3d 81, 91 n.13 (2d Cir. 2010).

14 We have considered Joseph's remaining arguments and,
15 after a thorough review of the record, find them to be
16 without merit.

17 For the foregoing reasons, the judgment of the district
18 court imposing a sentence principally of 120 months'
19 imprisonment is hereby **AFFIRMED**.

20
21 FOR THE COURT:
22 Catherine O'Hagan Wolfe, Clerk
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